

# BILL ANALYSIS

DEPARTMENT Coastal Commission	AUTHOR Duchenev	BILL NUMBER AB 2310
SUBJECT Public Resources Code: Resource Planning and Management	DATE LAST AMENDED 2/25/00	

## **I. SUMMARY:**

### **A. Bill Summary:**

This bill would amend Sections 30233, 30240 and 30411 of the Public Resources Code (California Coastal Act) to include recreational, residential and commercial development as allowable uses in degraded coastal wetlands; allow transportation projects in wetlands and other development in areas designated as Environmentally Sensitive Habitat Areas (ESHAs); and change the current 'balancing provision' of the Act to allow the Commission to permit more intensive, non coastal-dependent uses in wetlands and ESHAs by balancing the broad programmatic goals in Chapter 1 of the Act, against the specific resource protection policies contained in Chapter 3 of the Act. Under this proposed bill, the Commission could allow development not otherwise permitted in wetlands found to be 'degraded' by the Department of Fish and Game, if, in conjunction with such development, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland. Development in ESHAs could be allowed if the Commission finds habitat values to be degraded and that higher habitat values of the same type could potentially be achieved at another location through protection, maintenance, enhancement, creation or restoration of those values.

The bill also prohibits the Commission from taking actions in conflict with Habitat Conservation Plans (HCPs) and Natural Community Conservation Plans (NCCPs) approved by the Department of Fish and Game.

### **B. Summary of Issues/Concerns:**

The revisions to these sections would allow the Commission to approve significantly more development, and more types of development, in wetlands and ESHAs. By allowing the Commission to balance broad Chapter 1 goals and objectives against specific Chapter 3 policies, the Commission would be able to make findings and approve projects that directly conflict with the Coastal Act, as written. It also seeks to exempt HCPs and NCCPs within the Coastal Zone from Coastal Commission review. AB 2310 would allow offsite mitigation for filling of wetlands less than one acre in size, potentially resulting in a net loss of coastal wetlands. Collectively, this proposal would significantly weaken the environmental protection policies of Coastal Act, and allow for substantial loss of coastal resources historically protected by the Act.

### **C. Fiscal Summary:**

The Coastal Commission could incur costs due to an increase in permit applications, litigation and LCP amendments as the result of increasing the number and type of allowable uses in wetlands and ESHAs. The potential for de-certification of the state's coastal program puts current and future federal funding at risk.

### **D. Sponsorship:**

California Building Industry Association

### **E. Related Legislation:**

SB 2086 (Bowen)

### **F. Support and Opposition:**

Support: Unknown at this time

Opposition: Unknown at this time

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## **II. ANALYSIS:**

### **A. Existing Law:**

#### Wetlands

The Coastal Act provides the highest degree of protection for coastal wetlands, due to their important function in coastal ecosystems, their scarcity (California has lost over 95% of its coastal wetlands in southern California) their critical habitat value for rare and endangered species, and their important role in marine fisheries.

Current law (PRC Section 30233) permits wetland fills only for the following uses:

- New or expanded port, energy and coastal-dependent industrial facilities
- Maintaining existing navigation channels, mooring areas and boat ramps,
- Incidental public services (utility lines, cables, etc)
- Mineral extraction, including sand excavation
- Restoration, and
- Nature study and aquaculture

No other uses in wetlands may be approved in accordance with the Coastal Act unless the Commission makes the necessary findings that denial of a project would create a conflict with another specific Coastal Act policy (such as protecting coastal-dependant agriculture, water quality, biological productivity of coastal waters, etc.) In such cases, the Commission may approve wetland fill or dredging using the balancing provision contained in section 30075.5, but only if the project approval is the environmentally superior alternative. For instance, if a project requiring a wetland fill incorporates practices which improve water quality overall, the Commission has the discretion to approve it.

#### ESHA

Environmentally Sensitive Habitat Areas are defined in Section 30107.5 as “any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.” While wetlands are a type of ESHA, other examples of ESHAs include riparian corridors, endangered species habitat, native grasslands, oak woodlands, Monterey pine forests, dune habitat, etc.

Environmentally Sensitive Habitat Areas are protected under Section 30240, which states that they “...shall be protected against any significant disruption of habitat values, and only uses dependant on those resources shall be allowed in those areas.”

Uses dependent on the ESHA may include research facilities, trails, nature studies, recreation, public education, etc.

Again, specific findings using the balancing provision must be made in order to allow development which is more intensive than what is allowable under Section 30240.

### **B. This Bill Would:**

- Add residential, commercial and recreational development to the list of allowable uses in degraded wetlands if accompanied by restoration of a substantial portion of the remaining wetland.
- Allow destruction of a degraded wetland (as defined by the Department of Fish and Game) less than 1 acre in size if a “biologically productive wetland” is provided elsewhere.
- Broaden the balancing provision in section 30007.5 to allow the Commission to override Chapter 3 wetland and ESHA protection policies by applying the general goals and objectives contained in Chapter 1 .
- Allow wetland fill or ESHA destruction for transportation projects (e.g., highways and freeways, toll roads, parking lots and garages, rail and transit projects).
- Allow any non-resource dependent use in ESHA if the Commission determines that higher habitat values of the same type can be achieved at another location through the protection, maintenance, enhancement, creation or restoration of those values.
- Exempt HCPs and NCCPs from Coastal Commission review.

### **C. Issues/Concerns**

- Wetlands are essential to the health of coastal ecosystems, and are thus afforded a high degree of protection under the Coastal Act. Over 95% of southern California wetlands have been lost to development or other human impacts. Because so few wetlands remain and areas suitable for restoration are limited, preservation of California’s wetland protection policies should remain as strong as possible. In addition, industrial uses currently allowed under the Coastal Act, such as commercial ports, must find areas that can be restored as mitigation for their projects. Adding recreational, residential and commercial uses in degraded wetlands as allowable uses in conjunction with restoration will cause a further loss of coastal wetlands and increases the competition for (and cost of) remaining mitigation sites for projects currently consistent with the Act.
- Allowing destruction of degraded wetlands less than one acre in size so long as “biologically productive” wetlands are provided elsewhere could lead to a net loss of coastal wetlands, if the mitigation site is outside the Coastal Zone, or if the mitigation simply restores or maintains, but does not expand, an existing site.

- AB 2310 would change existing Commission practice when applying the balancing provision in section 3007.5. It would allow the Commission to use the broad goals and objectives contained in Chapter 1 of the Act to override the specific resource protection provisions contained in Chapter 3. Under existing law, the Commission may approve development not otherwise allowable if, a) denial of the project creates a conflict between two or more specific Chapter 3 policies, and b) the project results in a net environmental benefit. If AB 2310 is enacted, the Commission could approve destruction of wetlands and ESHA (whether degraded or not), agricultural lands, public access, landforms, scenic views and commercial fisheries facilities if it found that the proposed development "...balanced utilization ... of coastal zone resources taking into account the social and economic needs of the people of the state." (section 30001.5 PRC)
- The bill also allows wetland destruction for transportation projects that further public access to or along the coast, based on current or future needs. Since any transportation project in the Coastal Zone could arguably enhance public access, either now or in the future, this provision would allow virtually any highway, freeway, toll road, parking lots, parking garages, or rail construction or expansion to be approved in wetlands or ESHA. The Commission currently has the ability to approve some transportation development in ESHAs, provided section 30007.5 is properly applied. AB 2310 would remove the Commission's current authority to require environmentally superior conditions on transportation projects.
- The provisions of AB 2310 relating to ESHAs would allow destruction of any ESHA if the Commission chooses to use the new, expansive reading of section 30007.5 if it finds that, "on balance," impacted habitat values can be provided in other locations with the "potential" of maintaining long-term habitat values. This will result in a net loss of ESHAs, in two ways. First, it only requires the protection and/or enhancement of existing habitat values elsewhere. Second, it requires only that the mitigation site have the *potential* to provide such values.
- AB 2310 exempts Habitat Conservation Plans and Natural Community Conservation Plans from Coastal Commission review. In some cases, the Commission has recognized such plans as meeting Coastal Act policies and has approved coastal development permits pointing to the application of such plans as meeting habitat protection policies of chapter 3. But in many cases their preparation was undertaken without Coastal Commission participation and may not be consistent with Chapter 3. If this provision in AB 2310 becomes law, the Commission could do nothing to prevent the loss of ESHA within the coastal zone even though the protected habitat used to justify such loss may not be coastal specific and is located well outside the coastal zone. This provision would in effect repeal Coastal Act policies to protect habitat values in the coastal zone in areas with HCPs or NCCPs that protect public and private lands inland of the coastal zone.
- California's coastal management program (CCMP) was approved by the federal government in 1977 and includes the strong coastal wetland and ESHA protection policies of chapter 3. As a result of federal approval of California's coastal management program, California gained regulatory review authority over any federal action, including permits and licenses for any activity that could affect coastal resources. This includes Commission authority over offshore oil and gas development, military projects (i.e., the Navy's homeporting of nuclear carriers in San Diego Bay), Corps of Engineers permits and dredging projects (i.e. the Border Fence), national park projects and nation wide permits by EPA and the Corps of Engineers. Any major amendment of the CCMP requires approval from the federal Office of Ocean and Coastal Resources Management in the National Oceanic and Atmospheric Administration in the Department of Commerce. The proposed amendments in AB 2310 could result in the decertification of California's program with a resulting loss of federal consistency review authority and federal funding.

### **III. BACKGROUND**

This bill was conceived in response to a 1999 Fourth Appellate District Court of Appeals decision on *Bolsa Chica Land Trust et al v. the Trial Court of San Diego County*. In that case, the Commission approved an amendment to the Orange County certified Local Coastal Program, allowing the construction of 900 homes in wetlands, and 2,500 homes on Huntington Mesa in a 1,588 acre undeveloped area known as Bolsa Chica. The project required substantial wetland fills in the lowlands, and destruction of a grove of eucalyptus trees on the mesa, designated as an ESHA in the LCP because of its habitat value for raptors. A road expansion to accommodate additional traffic would also require some wetland fill. Although the Coastal Act permits ESHA destruction only for those activities dependent on those resources, and contemplates very few allowable uses in wetlands (not including residential development), the Commission found that because the developer intended to restore a portion of the wetlands with proceeds from home sales, and replace the eucalyptus grove with newly planted native trees and nesting boxes, that the project was approvable. Several environmental groups sued the Commission and the developer on March 6, 1996.

The trial court upheld the Commission's approval of the 2,500 homes on the mesa, but found that the approval of 900 homes in a wetland was inconsistent with the Coastal Act. The project proponents appealed the decision, which the appellate court upheld. Additionally, the appellate court found that the development on the mesa was inconsistent with the Coastal Act, which states ESHAs "...shall be protected against any significant disruption of habitat values, and only resources dependant on those resources shall be allowed within those areas." It also found the Commission had not made the necessary findings that the filling of a wetland on the mesa to accommodate the widening of an existing road to serve the new development was consistent under the Coastal Act.

In short, the appellate court found that residential development is not one of the specific enumerated and narrowly defined allowable uses in wetlands, nor does it supercede the Coastal Act policy to protect environmentally sensitive habitat areas.

After the *Bolsa Chica* court decision, the Commission determined not to take issue with that ruling and instead concluded that it could carry out Coastal Act requirements consistent with the decision by being careful to allow adverse impacts on ESHAs and wetlands only

where a conflict between specific chapter 3 policies can be resolved in a manner that is, on balance, most protective of significant coastal resources.

The language in AB 2310 goes beyond the *Bolsa Chica* decision by specifically allowing residential, recreational and commercial development in wetlands. It makes it possible to justify the destruction of ESHA by trading off any Coastal Act provisions shown to be in conflict. The Commission has already found a way to operate within the parameters of the *Bolsa Chica* decision to allow appropriate new development projects to proceed, using the existing balancing provision.

#### **IV. RECOMMENDATION:**

##### **A. Position:**

Oppose

##### **B. Reason for Recommendation:**

AB 2310 would significantly weaken the Coastal Act, putting coastal resources and the state's federal consistency review authority at risk. The Coastal Commission currently has the discretion and the tools to approve reasonable development in the Coastal Zone using the existing balancing provision. This legislation attempts to solve a problem that has not been demonstrated to exist by allowing the Commission more discretion to approve types of development not contemplated by the voters when they passed the Coastal Initiative in 1972, nor the Legislature when it approved the Coastal Act in 1976.